KENNETH PATRICK McCOSH
versus
PIONEER CORPORATION AFRICA LIMITED

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 14, 15 June and 28 July 2010

Civil Trial

T Magwaliba, for the plaintiff
A. Moyo, for the defendant/excipient

KUDYA J: The plaintiff, a former financial director of the defendant company, filed summons on 8 July 2009 seeking payment of the capital sum of US$72 334-00 and interest at the rate of 10% per annum from the date when the amount fell due to the date of the issue of summons in the sum of US$12 658-00, payment of interest on the capital amount at the rate of 10% from the date of the issue of summons to the date of payment in full and costs of suit. The defendant contested the matter.

The plaintiff's cause of action was disclosed in para(s) 3, 4 and 5 of its declaration in these terms:

3. The defendant became indebted to the plaintiff in respect of arrear salaries and other benefits arising from a contract of employment concluded between the parties on or about 21 September 2004 that was terminated by the plaintiff's resignation from employment on 7 March 2007.

4. During the month of April 2007, the defendant partly liquidated the amount claimed by the plaintiff by delivering to the plaintiff a motor vehicle and a laptop computer whose agreed values totaled US$30 000-00.

5. On or about 18 July 2007, the Group Chief Executive Officer of the defendant, Mr Hamish Rudland acknowledged liability for the sum as at that date of US$70 000-00 which would attract interest at the rate of 10% per annum.

The defendant raised a plea in bar based on two grounds before pleading over to the merits. Its plea reads as follows:

1. As appears from plaintiff's declaration:-

1.1 The cause of action is predicated on a contract of employment concluded by the parties on 21 September 2004.
1.2 The claim is for payment of alleged arrear salaries and benefits consequent upon resignation.
1.3 The payment of salaries and benefits during and upon termination of a contract of employment is governed by the provisions of the Labour Act [*Cap 28:01*].
1.4 Accordingly and in terms of s 89 (6) of the Labour Act, this Honourable Court has no jurisdiction to hear and determine this claim.

2. Additionally but without prejudice to the above, the defendant avers that:

2.1 The contract of employment between the parties provided for payment of salaries and benefits in Zimbabwe dollars, being the lawful legal tender.
2.2 The plaintiff's claim is denominated in foreign currency, namely the United States dollars.
2.3 At the material time, the payment of salaries and benefits in foreign currency without exchange control approval was illegal and unenforceable by virtue of:

2.3 1. The Exchange Control Act [*Cap 27:05*]
2.3.2. Exchange Control Regulations, 1996, SI 110/1996
2.3.3. The Labour Act [*Cap 28:01*].

2.4. In the premises, the plaintiff's claim is bad and unsustainable at law and ought therefore to be dismissed with costs.

In pleading over to para(s) 3, 4 and 5 of the plaintiff's declaration the defendant denied these averments and put the plaintiff to the proof thereof and reiterated that the mode of payment sought was unlawful.

In his replication, the plaintiff averred that his cause of action was premised on an acknowledgment of debt signed by a representative of the defendant and not on the terms of employment. He also averred that the defendant was obliged to obtain the necessary foreign currency exchange approvals to pay him in foreign currency using its free funds.

At the pre-trial conference that was held on 8 April 2010, the following four issues were referred to trial:

a). whether or not this Honourable Court and in the light of s 89 (6) of the Labour Act [*Cap 28:01*] has jurisdiction to adjudicate over the dispute between the parties;
b). whether the contract of employment between the parties provided for payment to the plaintiff in United States dollars and the amount thereof;
c). whether the plaintiff's claim was lawful at the material time; and
d). what amount if any is due to the plaintiff.

The trial in this matter was held on 14 June 2010. The plaintiff called the evidence of two witnesses and produced a 40 paged bundle of documents as exh 1. After the close of the

plaintiff's case the defendant elected to open and close its case without calling any evidence. My findings of fact are based on those aspects of the evidence called by the plaintiff that survived cross examination.

The plaintiff holds a Bachelor of Law (Honours) degree from the University of Zimbabwe (1983) and is a chartered accountant (1988). He was the Group Financial Director of the defendant from 1 June 2004 until his resignation on 7 March 2007. His contract of employment with the defendant is covered in pages 2 to 6 of exh 1. The relevant sections fall under the headings Remuneration and Benefits. I set them out below.

"3. REMUNERATION

As remuneration for services rendered, the Contractor shall pay the contracted person during the subsistence of this agreement the sum of $21 million per month, payable monthly in arrears. The salary will be subject to taxation in line with the rules and regulations of the Zimbabwe Revenue Authority. As you are on a fixed term contract the company is not liable to pay any further sums of money, which may be required of you by operation of law. This shall be reviewed every quarter

4. BENEFITS

In addition to the salary stated above, you will be entitled to the following:

4.1. Cimas Medexec Medical Aid for you and your family.
4.2. Use of a company vehicle and 200 liters per month. Such allowance is for monthly usage and shall not accrue.
4.3. School fees for two children, but any change in school requires the authority of the CEO.
4.4. Cafeteria/entertainment allowance to be agreed annually by CEO.
4.5. Any other amounts will be deducted from the cafeteria allowance."

The plaintiff indicated that his claim was based on the contents of pp 7 and 8 of exh 1. It is an e-mail dated 13 July 2006 which the plaintiff dispatched to himself and copied to his website. It was signed and dated at the bottom of each page by Hamish Rudland, the acting chief executive officer of the defendant at the time. The purported acknowledgment of debt was sandwiched between a set of seven actions plans on the first page and another set of seven action plans on the second page. The acknowledgments read:

"HR acknowledges outstanding balance to KPM of US 70 K subject to update of figures
HR acknowledges 10% interest per annum calculated monthly
HR acknowledges salary US6 K per month inclusive of local salary."

The plaintiff stated that HR referred to Hamish Rudland while KPM referred to the plaintiff. He stated that the defendant was to promote a company in Mauritius which would be used as the vehicle to pay top management in Zimbabwe in foreign currency and pay his outstanding debt.

It was common cause that the vehicle and laptop were sold to the plaintiff as indicated in the letter by HR of 10 September 2007 on p 18 of exh 1. He averred that the two items were valued at US$30 000-00 and abated the outstanding capital sum and interest.

On pages 19 and 20 are the purported minutes that he wrote on 15 January 2008 of a meeting he held with HR and the plaintiff's wife in which he recorded *inter alia* his demand for payment of the outstanding debt by Pioneer Corporation Africa (PCA) and the reluctance to pay by HR until he had received a return on his investment and an undertaking that payment would be made at a later date. He was the only one who signed those minutes.

He also relied on the minutes he authored on 18 March 2009 between HR, EM Warhurst (EMW) and himself on pp 29-30 of exh 1. They were signed by EMW and the plaintiff only. They indicate that PCA owed EWW US$15 000.00 and the plaintiff just over US$ 80 000.00 While they show that HR was unwilling to pay the debt, they record that he had signed the plaintiff's contract of employment and acknowledgment of debt in July 2006.

Pages 38 - 39 show that from October 2003 to February 2007 the defendant was entitled to receive from the plaintiff US$215 000-00 in salary. He was paid a total of US$157 251-00 between October 2003 and March 2007. The capital outstanding in salary arrears was US$57 749-00. The amount due as interest from December 2005 to June 2009 was in the sum of US$26 462-00

He was cross examined. He based his claim on an acknowledgement of date of 17 July 2006. The acknowledgment arose from the failure to pay salaries during the period extending from October 2003 to February 2007. He stated that he did not sue the defendant for arrear salaries that were incurred between October 2003 and July 2006 because during that period he was a member of the plaintiff's management team. He accepted that at that time legal tender in Zimbabwe was the local dollar. He was referred to s 12A of the Labour Act. He was evasive on whether his claim was founded on a contract of employment or not. He was evasive on whether payment in United States dollars was payment in kind or not. He stated that in 2006 there were no exchange control prohibitions against the payment of salaries in foreign currency but conceded that during the period of his employment with the defendant he was

never paid in United States dollars. He further acknowledged that at that time the defendant did not pay any of its employees in foreign currency. He said the United States dollar was used to index the payment in kind in the form of air tickets that he received for holidays outside Zimbabwe. He admitted that he could not claim in United States dollars before February 2009. He accepted that the e-mail of 18 July 2006 was made when HR had taken over as the Acting chief executive officer of the defendant but denied that it was a mere update of the company's affairs and hand over/take over summary sheet. He said it was not an exchange of information document but a contract between the plaintiff and the defendant. He accepted that it was not in the usual mode of an acknowledgement of debt that is drawn up by legal practitioners. He averred that at the time the defendant was obliged to pay him in the Zimbabwe dollar equivalent of US$70 000.00 at the prevailing parallel market rate of exchange.

He called Edward Mark Warhurst, a practicing legal practitioner who at the time was the Group Company Secretary and Managing Director of Clan Transport (Pvt) Ltd, one of the subsidiaries of the defendant. Warhurst confirmed the accuracy of the minutes written by the plaintiff at the meeting of 18 March 2009 found in exh 1. He said HR sought to refute indebtedness on the basis that the plaintiff had given poor service to the defendant but he accepted that the defendant owed the plaintiff arrear salaries in foreign currency for which it was unable to pay.

He was cross examined. He was a workmate of the plaintiff during the period 2003 to 2006 when he worked for the defendant. He was owed arrear salaries in foreign currency for the period September 2005 to August 2006. He was invited by the plaintiff to the meeting of 18 March 2009 because both were creditors to the defendant. He confirmed that his salary was paid in local currency.

It is on the basis of the evidence led that I proceed to determine the issues referred to trial.

a). whether or not this Honourable Court and in the light of s 89 (6) of the Labour Act [Cap 28:01] has jurisdiction to adjudicate over the dispute between the parties.

Mr *Moyo,* for the defendant, submitted that this court did not have the jurisdiction to deal with this matter as it is a labour dispute. The plaintiff conceded in his replication that were the present matter a labour dispute he would have had to file it out of the Labour Court. It seems to me, notwithstanding that this court is a superior court imbued with inherent jurisdiction, that all labour disputes must be dealt with in terms of the relevant provisions of the Labour Act. It

was common cause that s 89 (6) of the Labour Act ousts the inherent jurisdiction of this court to hear labour disputes, in the first instance. Put in other words, the High Court cannot be the first port of call to any party in a labour dispute. The dispute, being one of right and not interest would perforce be dealt with in terms of s 93 of the Labour Act by a labour officer who could refer it to arbitration from whence it would find its way to the Labour Court.

Mr *Magwaliba,* for the plaintiff, submitted that this court had the jurisdiction to determine this matter because the plaintiff's case was found on an acknowledgment of debt and not on a contract of employment. It is correct that in our law, an acknowledgment of debt can found a cause of action. See *Chimutanda Motor Spares* (*Pvt*) *Ltd* v *Musare & Anor* 1994 (1) ZLR 310 (H) at 311G; *Gondwe* v *Bangajena* 1988 (1) ZLR 1 (H) at 2A and *Salisbury Municipality* v *Partington & Anor* 1961 (3) SA 218 (SR) at 222A.

Mr *Moyo* contended that the plaintiff pleaded his cause of action as the contract of employment. He argued that reference to an acknowledgment of liability by the defendant's acting chief executive officer in the declaration did not shift the cause of action to that of an acknowledgment of debt. He further contended that the document purported by the plaintiff to be an acknowledgment of debt was merely an update of the company's affairs and a hand over/take over sheet.

Mr *Magwaliba* contended that the statements sandwiched between other unrelated action plans constitute an acknowledgment of debt. His contention appears to be borne out by the sentiments expressed by McNALLY J in *S v Manyere* 1984 (1) ZLR 104 (H) at 107 C to the effect that an "I owe you" left in a cash box would constitute an acknowledgment of debt. It is correct that the defendant did not call evidence to dispute the facts set out by the plaintiff and his witness or offer an alternative version of events. It is also correct that subsequent to the acknowledgement of debt two sets of minutes were written by the plaintiff that the defendant's acting chief executive officer refused to sign which show that he acknowledged the defendant's indebtedness to the plaintiff in the amount claimed. Again, the plaintiff's version was supported by Warhurst, who was a forthright and credible witness.

It seems to me, notwithstanding the failure by the defendant to lead evidence, that Mr *Moyo's* contention that the plaintiff's cause of action was predicated on a contract of employment is correct. In my view, paras 4 and 5 of the plaintiff's declaration are explanatory averments of how he arrived at the capital sum and interest claimed. The legal foundation of the claim lies in the contract of employment. Para 3 of the declaration is the basis of the

plaintiff's claim. I understand him to be averring that the debt for which he seeks redress arose from unpaid salary arrears. This is confirmed in the further particulars supplied by the plaintiff as read with the information supplied to the defendant's chairman on pages 31 to 39 of exh 1 in which he collated the outstanding salaries from October 2003 to February 2007 and outstanding interest due from December 2005 to June 2009. The failure by the defendant to plead that his claim was based on an acknowledgment of debt executed on 18 July 2006 further confirms that he found his claim on unpaid arrear salaries. Accordingly, I uphold the exception raised by the defendant and dismiss the plaintiff's claim on the basis that this court lacks the jurisdiction to determine the matter by virtue of the provisions of s 89 (6) of the Labour Act.

However, in the event that I am wrong, and the cause of action was properly pleaded in terms of para 5 of the declaration, I proceed to deal with the other issues that were referred to trial.

b). whether the contract of employment between the parties provided for payment to the plaintiff in United States dollars and the amount thereof

The plaintiff confirmed in his testimony that the contract of employment did not provide for payment in United States dollars or any foreign currency. He alleged that payment in United States dollars was incorporated as a cafeteria benefit. He agreed that the contract did not delineate the United State currency as the currency of account for the cafeteria allowance. He did not produce a document in writing and signed by both parties to demonstrate that the contract of employment was varied as contemplated by para 14 of the contract of employment. The second issue is determined in favour of the defendant.

c). whether the plaintiff's claim was lawful at the material time

The time referred to is the period from October 2003 to 7 March 2007. Mr *Moyo* submitted that it was unlawful at the time for a Zimbabwean registered company to pay its employees in foreign currency for work performed in Zimbabwe without exchange control authority. He relied on the provisions of s 4(1) (a) (ii) of the Exchange Control Regulations SI 109/96. Mr *Magwaliba* submitted that the exchange control legislation was not violated by an agreement to pay a salary in foreign currency to the plaintiff in Zimbabwe for work done in Zimbabwe. He relied on a case in which the claim was based on an acknowledgment of debt that the defendant did not sign but was reduced to writing by the plaintiff's legal representative

which reflected the terms of the oral agreement reached of *Macape (Pty) Ltd* v *Executrix Estate Forrester* 1991 (1) ZLR 315 (SC) at 320B-C where McNALLY JA dealing with ss 7 and 8 of the Exchange Control Regulations 1977 the precursor to the present ss 10 and 11 of the Exchange Control Regulations 1996 stated:

> "The essential point to be noted is that there is a clear difference between ss 7 and 8. The former proscribes only the actual payment. The latter proscribes both payment and the underlying agreement to pay.
>
> In other words, when one is concerned with payments **inside** Zimbabwe it is perfectly lawful to enter into the agreement to pay. But, without authority from the Reserve Bank, the actual payment may not be made. By contrast, when dealing with payments **outside** Zimbabwe, it is unlawful even to enter into the agreement to pay, without first obtaining the authority of the Minister, whose powers have been delegated to the reserve Bank."

The case dealt with the payment in local currency in Zimbabwe of a foreign resident by a Zimbabwean resident.

The facts in *Macape, supra,* differ with those in the present case in that in the former case payment was made by a local resident for the account of a foreign resident in local currency. In present case a local resident was to pay another local resident in foreign currency. The former concerned an outflow of foreign currency while the present matter concerned the in flow of foreign currency.

It seems to me that the payment of an employee's salary in foreign currency, at the time, would have contravened s 4 (1) (a) (ii) of the Exchange Control Regulations. Both CHINENGO J and GOWORA J held in separate cases of *Jumvea Zimbabwe Ltd & Anor* v *Matsika* 2003 (1) ZLR 71 (H) at 74G and *Gambiza* v *Tavaziva* HH 109-08 at p 4 of the cyclostyled judgment, respectively, that payment of foreign currency whether inside or outside Zimbabwe would amount to an exchange and thus be in violation of s 4(1) (a) (ii) of the Exchange Control Regulations. In the present case the defendant did not make any payment but entered into an agreement to pay. Mr *Magwaliba* was therefore correct that such an agreement was not prohibited by the exchange control regulations. This is what McNALLY JA had in mind in the *Macape* case, *supra*, when he said at p 321A-B:

> "The contract to pay is lawful. Actual payment in pursuance of the contract is unlawful, without permission. There is no reason why the court should not order payment; subject to the condition that authority is obtained. I must make it clear that this judgment in no way inhibits the Reserve bank in the exercise of its discretion. It is entirely for the Reserve bank to decide whether or not to authorise the payment. If it decides not to do so the payment may not be made. The contract remains lawful.

Payment will then have to await a change either in the law or in the policy of the Reserve Bank."

I hold that the contract to pay the plaintiff in foreign currency did not contravene any exchange control regulations.

Mr *Moyo* further contended that payment in foreign currency contravened s 12A (1) of the Labour Act. Mr *Magwaliba* countered by arguing that s 12A (2) allowed for the payment of employees in foreign currency. Section 12A (1) and (2) read:

12A Remuneration and deductions from remuneration

(1) Remuneration payable in money shall not be paid to an employee by way of promissory notes, vouchers, coupons or in any form other than legal tender.

(2) Remuneration may be payable in kind only in industries or occupations where such payment is customary, and shall be subject to the following conditions—

(*a*) any such payment shall be appropriate for the personal use and benefit of the employee and the employee's family;

(b) the value attributed to such payment shall be fair and reasonable;

(*c*) equipment or clothing required to protect the health and safety of the employee shall not be computed as part of the remuneration of the employee;

(*d*) no payment shall be made in the form of liquor or drugs;

(*e*) remuneration in kind shall not substitute entirely for remuneration in money.

Mr *Moyo* argued that at the time of employment legal tender was constituted by local banknotes and coins. He submitted that though foreign currency was money, at the time, it was not legal tender in Zimbabwe. Mr *Magwaliba* did not controvert this argument. Rather, he ingeniously contended that the fact that the Exchange Control (Payment of Salaries by Exporters in Foreign Currency for Critical Skills Retention) Order SI 127/2008 introduced for the first time the need for an exporter to seek exchange control authority to pay salaries in foreign currency showed that the payment of salaries in foreign currency was not proscribed before its promulgation. He went on to argue that as this subsidiary legislation did not have retrospective effect, it did not affect the plaintiff whose contract of employment ended in March 2007. I, however, agree with Mr *Moyo's* rebuttal that the introduction of SI 127/08 into our law was the first inroad made against the restrictive provisions of s 12A (1) against the payment of salaries in any currency other than local currency.

Subsections (1) and (2) of s 12A of the Labour Act, *supra*, recognize the payment of remuneration in cash or in kind. Subsection (1) restricts those employers who remunerate their employees in money to the use of legal tender to the exclusion of other modes of payment such as promissory notes, vouchers, coupons or any form other than legal tender. I understand the phrase 'any form other than legal tender' to be of wide application. In my view, it restricts payment to the use of legal tender and excludes payment in kind or money that is not legal tender. Subsection (2) permits employers who are in occupations or industries that customarily pay remuneration in kind to do so. Paragraph (e) of subs (2) of s 12 puts it beyond doubt that remuneration in kind is not the same as remuneration in money. This same paragraph, in my view, is clear prove that in the mind of the legislature legal tender in s 12A (1) was another euphemism for money. See *Rhodes Motors* (*Pvt*) *Ltd* ***v*** *Pringle-Wood NO* 1965 (4) SA 40 (SRA) at 42D where legal tender is considered and treated as money; *S* v *Zakana* 1976 (2) SA 248 (R) where SMITH J by reference to The Shorter Oxford English Dictionary defined legal tender to be *inter alia* "the money of a country in actual use'."; and McNALLY JA in *S* v *Bennett-Cohen* 1985 (1) ZLR 46 (SC) at 51B defined legal tender as currency or money. The same LEARNED JUDGE OF APPEAL in *S* v *Mafarachisi* 1990 (1) ZLR 118 (SC) at 121E approved the definition by Cowen in *The Law of Negotiable Instruments in South Africa* 5 ed vol I at p 47 that legal tender was "the medium legally authorised by the State for the payment of debts."

Mr *Moyo's* submission that foreign currency did not constitute legal tender at the time of the plaintiff's contract of employment with the defendant is borne out by the views of textbook writers and case law. The definition of legal tender is provided by Mann in *The Legal Aspect of Money* 4th ed at p 41 in these words:

> "Legal tender is such money in the legal sense as the legislator has so defined in the statutes organizing the monetary system. Chattels which are legal tender have, therefore, necessarily the quality of money, but logically, the converse is not true, --- not all money is necessarily legal tender. The question what money is to be considered legal tender is usually answered by the statutes organizing the monetary system".
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> Again at p 186 the learned author states:
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> "Where these principles lead to foreign money being regarded as money, the conclusion is in no way affected by the established rule that foreign money is not legal tender, for not all money is legal tender, but all legal tender is money. Legal tender is such money as is 'current coin of the realm'. This does not mean more than that foreign money cannot be tendered in discharge of a debt to pay pounds sterling, but it does not

> touch the question of the manner of discharging in England a debt expressed in foreign money."

Willis in *Banking in South African Law* Juta 1981 at p 200 observes that in terms of the SA Mint and Coinage Act 75 of 1964 the South African Reserve Bank has the power to issue and make bank notes and coins and that these coins and banknotes constitute legal tender in South Africa. At p 191 Willis confirms that in South Africa foreign money is not legal tender. He writes:

> "The definition of foreign currency has since been amended to mean 'any currency which is not legal tender in the Republic'".

Christie in *The Law of Contract in South Africa* 3rd ed at p 458 is in agreement with the observations made by Willis.

Morse in Vol 1 of *A Treatise on the Law of Banks and Banking* 3rd ed (1888) at para 312 at p 536 recognizes the sovereign right of every state to define what is legal tender within its jurisdiction in these words:

> "The right of the depositor is not, however, necessarily to the gold or silver coin of the country; but only to such money as is by the law of the land legal tender at the time."

In Vol 2 in para 447 at p 736 the learned author defined legal tender in these words:

> "At present, in our country, the treasury notes of the United States have been made by Act of Congress a legal tender, and payment, or offer of payment, in them satisfies the duty of the bank; though it has bound itself by a specific agreement to pay in gold or silver coin".

And in para 637 at p 978 he wrote:

> "Bank bills are not money, in the strict sense of the term; that is to say, they are not legal tender, even to pay debts due to the bank itself."

The textbook writers have equated legal tender with currency and noted that what constitutes legal tender in any country is governed by the legislation of that country. In Zimbabwe the term is used, *inter alia*, in s 12A of the Labour Act, *supra*; s 41 (1), 42 (1), 44 (2) and s 44A of the Reserve Bank of Zimbabwe Act [*Cap 22:15*], and in the definition sections of the Balance of Payments Reporting Act [*Cap 22:16*] (Act No. 4/2004) and the Exchange Control Regulations SI 109 /1996.

At the time the acknowledgment of debt was entered into the legal tender for the payment of salaries in Zimbabwe was local currency and not foreign currency. The defendant could not under s 12A (1) of the Labour Act agree to pay the plaintiff in foreign currency. That

the plaintiff was aware that it was unlawful is shown by his failure to invoke the provisions of s 13 of the Labour Act for the payment of the purported arrear salaries when he left employment; and his failure to write into the terms of his contract of employment payment of part of his salary in foreign currency.

Formal acknowledgments of debt that are usually prepared by legal practitioners contain renunciation clauses such as the one highlighted by YOUNG J in *Caltex (Africa) Ltd* v *Trade Fair Motors* (*Pvt*) *Ltd & Anor* 1963 (1) SA 36 (SR) at 36H like *non numeratae pecuniae, non causa debiti, errore calculi,* revision of accounts, *de duobus vel pluribus reis debendi.* There were no such renunciation clauses in the acknowledgment of debt in issue. In *Macape's* case, *supra,* at 321G McNALLY JA held that a court could go behind the making of an acknowledgment of debt to test its legality. He stated that:

> "There is no evidence before the court to show that the underlying cause of the acknowledgement of debt was illegal, and the acknowledgment itself was not illegal."

I am satisfied that the underlying cause of the acknowledgment of debt that was relied upon by the plaintiff was illegal. A court cannot enforce an illegal contract. See *Dube* v *Khumalo* 1986 (2) ZLR 103 (SC) at 109D.

There are other features of the case which were revealed by the plaintiff during cross examination which militate against the enforcement of the acknowledgment of debt against the defendant. The first was that he was never paid in foreign currency during his time of employment but was paid a salary in local currency that was indexed to the United States dollar at the parallel rate of exchange to preserve the purchasing power of the local currency. The acknowledgment of debt that was executed erroneously referred to the currency of indebtedness as the United States dollar. The acknowledgment of debt therefore told a lie about itself. The second disquieting feature was that the plaintiff averred that he was to be paid in foreign currency by an offshore sister company to the defendant called PXL that was to be set up in Mauritius in which the defendant's acting chief executive officer would have an interest. He did not disclose whether this company was ever set up. It seems to me that he should have sought payment from that company rather than the defendant.

I determine the third and fourth issues referred to trial in favour of the defendant. Accordingly, it is ordered that:

1. The exception raised by the defendant be and is hereby upheld.
2. The plaintiff's claim be and is hereby dismissed.

3. The plaintiff shall pay the defendant's costs of suit.

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Magwaliba & Kwirira, plaintiff's legal practitioners
Kantor & Immerman, defendant's legal practitioners